RICKY HINKLE,

Grievant,

v. **DOCKET NO. 02-29-069**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ricky Hinkle filed this grievance on November 7, 2001, stating, “I performed the job as Maint. Supervisor for 3 years March '99 to March 2001. Mr. Conn told me I would be reclassified after I gave him my letter that Mr. Temple had signed (I have 2 witnesses).” As relief, he seeks “to be reclassified & the pay for when [he] did the job.” The grievance was denied at Level I and II, and Level III was waived. A Level IV hearing was held on May 17, 2002, at the Grievance Board's Beckley office. John E. Roush, Esq. of the WVSSPA represented Grievant, and Harry M. Rubenstein, Esq. of Kay Casto & Chaney, PLLC represented Respondent. This matter became mature for decision on June 17, 2002, upon receipt of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence adduced at the Level II and Level IV hearings, the following facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent in the General Maintenance/HVAC/Mason multi-classification with 26 years of seniority. 2. David A. Temple was an Administrative Assistant in charge of maintenance, among other program areas, from February, 2000, until July 1, 2001, when he became Superintendent. At the time relevant to this grievance, he was the supervisor of Everett Conn, Director of Maintenance, who was Grievant's direct supervisor.

3. In the spring of 1999, shortly after Mr. Conn took over as Director of Maintenance, Grievant, of his own initiative, began performing many of the administrative tasks associated with Mr. Conn's position, because they were not being completed by Mr. Conn. Grievant asked Mr. Conn to be reclassified to Maintenance Supervisor, and Mr. Conn told him to make a written request to Mr. Temple.

4. In September, 2000, Grievant took a letter to Mr. Temple requesting reclassification. Mr. Temple signed the letter and instructed Grievant to take it to Mr. Conn, who should put something in writing for him to consider. Mr. Temple does not recall signing Grievant's letter and sending him back to Mr. Conn, but he does not deny that event happened.

5. On October 24, 2000, Mr. Temple sent a memorandum to Grievant stating he had reviewed his request to be reclassified with then-Superintendent Mattern. The memorandum lists the W. Va. Code definition of Supervisor of Maintenance, and informs Grievant that before any request for reclassification can be considered, Mr. Temple must have a written recommendation from Grievant's supervisor, after a review of Grievant's duties. It further states, “If Mr. Conn determines that reclassification is warranted and submits a recommendation, Mr. Mattern and I will give it due consideration, relative to the school personnel law.” [Lvl. II Resp. Exh. No. 2]. The memorandum was mailed to Grievant by Mr. Temple's secretary on October 24, 2000, and a copy was also sent to Mr. Conn. Grievant denies receiving this memorandum. 6. Grievant met with Mr. Conn and gave him the letter he had taken to Mr. Temple, and which Mr. Temple had countersigned. Mr. Conn told Grievant he would “give [him] the classification” if he would go out and make sure a waterline got put in properly at one of the schools.

7. In March, 2001, Mr. Conn assigned Grievant to a grass cutting crew, and Grievant stopped performing the duties that he felt warranted reclassification. He has not returned to those duties. In October, 2001, Grievant was told by a coworker that the coworker had overheard Mr. Conn talking to some other employees, and Mr. Conn told them he was not going to reclassify Grievant. Grievant then filed this grievance.

8. Respondent asserted at Level II that this grievance was untimely filed. [Level II Transcript, p. 2].

DISCUSSION

This grievance illustrates the common misconception that the grievance process is necessarily an adversarial proceeding that should not be resorted to until the parties are in direct opposition. Instead, it is intended to assist employees and employers “to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served.” W. Va. Code § 18-29-1. It should be used as soon as a grievable

problem arises to preserve the rights of the employee, and to create official awareness of the problem “in order to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level.” Id. The fact that it can and should be a cooperative process is often overlooked. The unfortunate consequence of this misconception is that many employees, like Grievant, hesitate to begin the process until it is too late. Although thelegislature designed the grievance process to be used to these ends, it also chose to include limitations that prevent employees from using the process unless they do so soon after the problem occurs.

It is one of these limits created by the legislature that Grievant has run up against, and which prevents the undersigned Administrative Law Judge from considering whether Grievant was actually misclassified for a period of time.

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

W. Va. Code § 18-29-4(a). Grievant had only fifteen days from the date he last performed the duties he claimed rendered him misclassified to file his grievance, by scheduling a Level I conference with his supervisor to discuss the issue. ”A grievance must be filed within the times specified in [W. Va. Code § 18-29-4] and shall be processed as rapidly as possible[.]” W. Va. Code § 18-29-3(a).

Grievant stopped performing the duties he claims rendered him misclassified in March, 2001, but waited until November, 2001, to file his grievance, so it was not filed within the time specified by W. Va. Code § 18-29-4. *See*, Gaskins v W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). His employer asserts that the untimely filing defeats the grievance. “Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.” W. Va. Code § 18-29-3(a). Respondent did make this assertion at the Level II hearing [Level II Transcript, p. 2]. “An untimely filing, if proven, willdefeat a grievance, in which case the merits of the case need not be addressed.” Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997); Crouch/Tyree v. Raleigh County Bd. of Educ., Docket No. 01-41-586 (Mar. 28, 2002).

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove

this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

The exception Grievant asserts is that Respondent caused the untimely filing by leading a grievant to believe a grievance need not be filed. However, this requires some overt act on the part of Respondent to dissuade Grievant from initiating the grievance procedure, such as outright telling him, “don't file a grievance yet.” "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies in good faith upon the representations of these officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to W. Va. Code [§§]18-29- 1, *et seq.*, upon the denial thereof." Steele v. Wayne County Bd. of Educ., Docket No. 50- 87-062-1 (Sept. 29, 1987). An untimeliness claim is barred only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989). *See*, Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

While Grievant did pursue his claim through an alternate route, first by delivering his request to Mr. Temple and thence to Mr. Conn, neither person represented to Grievant that the matter would be rectified, and neither person specifically advised Grievant that a grievance need not be filed. Importantly, neither Mr. Temple nor Mr. Conn had the authority to make the reclassification decision or to assure Grievant he would be reclassified.

Although Grievant had already done so, Mr. Temple instructed Grievant to make his request to his direct supervisor, Mr. Conn, and if Mr. Conn put something in writing, then he would consider that. Even though Mr. Conn had no authority to reclassify Grievant, he told Grievant he would “give Grievant the classification” if Grievant would oversee a waterline project, but that was the last Grievant heard of the matter. Then in the Spring of 2001, Mr. Conn sent Grievant out on a grass cutting crew, and he stopped performing the administrative-type duties Grievant felt rendered him misclassified. Grievant knew, or should have known, at that point that his reclassification request was going nowhere. He never returned to performing those administrative duties. Even if his earlier

statement had been a reliable promise, Mr. Conn's reassignment was a clear communication to Grievant that he would not be reclassified, and Grievant should have timely filed his grievance within 15 days of that reassignment.

The following conclusions of law supplement this discussion:

CONCLUSIONS OF LAW

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that heshould be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. “Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.” W. Va. Code § 18-29-3(a).

3.

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

W. Va. Code § 18-29-4(a).

4. "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies in good faith upon the representations of these officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to W. Va. Code [§§]18-29-1, *et seq.*, upon the denial thereof." Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987).

5. An untimeliness claim is barred only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W. VA. Human Rights Comm'n, 378 S.E.2d 843 (1989). *See*, Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20,

1993); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

6. The grievance procedure is intended to assist employees and employers "to reach solutions to problems which arise between them within the scope of their respectiveemployment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served." W. Va. Code § 18-29-1. It should be used as soon as a grievable problem arises to preserve the rights of the employee, and to create official awareness of the problem "in order to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Id.

7. "An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed." Lynch v. W. Va. Dep't of Transp., Docket No. 97- DOH-060 (July 16, 1997); Crouch/Tyree v. Raleigh County Bd. of Educ., Docket No. 01-41- 586 (Mar. 28, 2002).

8. Respondent did prove that this grievance was not timely filed, and Grievant did not demonstrate that he should be excused from filing within the statutory timelines.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: June 26, 2002 _____

M. Paul Marteney

Administrative Law Judge